

**TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH
CHAPTER 675. NURSING AND SPECIALIZED FACILITIES**

RULEMAKING ACTION:

Notice of proposed PERMANENT rulemaking.

PROPOSED RULES:

Subchapter 13. Staff Requirements

310:675-13-14. ~~Flexible~~ Twenty-four-hour-based staff-scheduling and eligibility requirements.

[AMENDED]

SUMMARY:

The amendments impose a direct-care service ratio of staff to residents based on a twenty-four hour schedule.

AUTHORITY:

Commissioner of Health, Title 63 O.S. § 1-104 ; Nursing Home Care Act, Title 63 O.S. §§ 1900, 1-901 *et seq.*

COMMENT PERIOD:

February 3, 2020, through March 7, 2020. Interested persons may informally discuss the proposed rules with the contact person identified below; or may, through March 7, 2020, submit written comment to the contact person identified below, or may, at the hearing, ask to present written or oral views.

PUBLIC HEARING:

Pursuant to 75 O.S. § 303(A), the public hearing for the proposed rulemaking in this chapter shall be on March 6, 2020, at the Oklahoma State Department of Health, 1000 Northeast Tenth Street, Oklahoma City, OK 73117-1207, in room 1102 from 9AM to noon. The alternate date and time in the event of an office closure due to inclement weather is March 10, 2020, in room 1102, from 9AM to noon. Those wishing to present oral comments should be present at that time to register to speak. The hearing will close at the conclusion of those registering to speak. Interested persons may attend for the purpose of submitting data, views or concerns, orally or in writing, about the rule proposal described and summarized in this Notice.

REQUESTS FOR COMMENTS FROM BUSINESS ENTITIES:

Business entities affected by these proposed rules are requested to provide the agency with information, in dollar amounts if possible, on the increase in the level of direct costs such as fees, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs expected to be incurred by a particular entity due to compliance with the proposed rule. Business entities may submit this information in writing through March 7, 2020, to the contact person identified below.

COPIES OF PROPOSED RULES:

The proposed rules may be obtained for review from the contact person identified below or via the agency website at www.ok.gov/health.

RULE IMPACT STATEMENT:

Pursuant to 75 O.S., § 303(D), a rule impact statement is available through the contact person identified below or via the agency website at www.ok.gov/health.

CONTACT PERSONS:

Kim Bailey, General Counsel, Oklahoma State Department of Health, 1000 N. E. 10th Street, Oklahoma City, OK 73117-1207; phone (405) 271-6017, e-mail KimB@health.ok.gov or Audrey C. Talley, Rule Liaison, Oklahoma State Department of Health, 1000 N. E. 10th Street, Oklahoma City, OK 73117-1207, phone (405) 271-9444 ext.56535, e-mail AudreyT@health.ok.gov.

INITIAL RULE IMPACT STATEMENT

(This document may be revised based on comment received during the public comment period.)

TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH CHAPTER 675

1. **DESCRIPTION:**

An amendment removes the requirements for flexible staff scheduling and adds twenty-four hour based staff scheduling and the requirements for twenty-four hour based staffing to align with SB 280, signed into law in 2019, effective 11/1/19, at 310:675-13-14. The proposal establishes the conditions for loss of twenty-four hour based staffing privileges. The proposal adds monitoring and evaluation of twenty-four hour based staffing facilities. The proposal establishes appeal rights and reporting requirements.

2. **DESCRIPTION OF PERSONS AFFECTED AND COST IMPACT RESPONSE:**

310:675-13-14. Affected persons will be residents and their families as well as owners, operators, and staff of nursing homes. The proposed rule will allow for twenty-four hour based staff scheduling such that the facility shall continue to maintain a direct-care service rate of at least two and nine tenths (2.9) hours of direct-care staff maintained over a twenty-four hour period. The current direct-care service ratio is two and forty-one hundredths (2.41).

3. **DESCRIPTION OF PERSONS BENEFITING, VALUE OF BENEFIT AND EXPECTED HEALTH OUTCOMES:**

310:675-13-14. Affected persons will be residents. The additional time will allow direct care staff more time with residents.

4. **ECONOMIC IMPACT, COST OF COMPLIANCE AND FEE CHANGES:**

310:675-13-14. These rules involve additional time and resources on the part of the facility and staff. The amount of time will be dependent on the condition of the resident. Facilities will be required to employ additional staff in order to meet the staffing requirements. The facilities will have an opportunity to recoup those cost thru the nursing facility incentive reimbursement rate plan administered by the Oklahoma Health Care Authority.

5. **COST AND BENEFITS OF IMPLEMENTATION AND ENFORCEMENT TO THE AGENCY:**

There are no costs associated with implementation.

6. **IMPACT ON POLITICAL SUBDIVISIONS:**

There will be no impact on political subdivisions and it will not require their cooperation in implementing or enforcing the proposed amendment.

7. **ADVERSE EFFECT ON SMALL BUSINESS:**

There is no known adverse economic effect on small business as provided by the Oklahoma Small Business Regulatory Flexibility Act.

8. **EFFORTS TO MINIMIZE COSTS OF RULE:**
There are no less costly means currently identified.
9. **EFFECT ON PUBLIC HEALTH AND SAFETY:**
310:675-13-14. This change is expected to improve health for residents based on improved staffing ratios.
10. **DETRIMENTAL EFFECTS ON PUBLIC HEALTH AND SAFETY WITHOUT ADOPTION:**
310:675-13-14. Without these changes, the agency would be out of alignment with Oklahoma Statute.
11. **PREPARATION AND MODIFICATION DATES:**
This rule impact statement was prepared on Monday, December 2, 2019.

TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH
CHAPTER 675. NURSING AND SPECIALIZED FACILITIES

SUBCHAPTER 13. STAFF REQUIREMENTS

310:675-13-14. ~~Flexible~~ Twenty-four-hour-based staff-scheduling and eligibility requirements.

(a) ~~Implementing flexible twenty-four-hour-based staff scheduling.~~ Each facility seeking to implement the flexible staff scheduling provisions of 63:1-1925.2(B)(5) shall request in writing a determination from the Department that the facility is in compliance with the staffing requirements of 63:1-1925.2(B)(3). On or after January 1, 2020, a facility may implement twenty-four-hour-based staff scheduling; provided:

- (1) such facility shall continue to maintain a direct-care service rate of at least two and nine tenths (2.9) hours of direct-care service per resident per day, the same to be calculated based on average direct care staff maintained over a twenty-four-hour period, and
- (2) at no time shall direct-care staffing ratios in a facility with twenty-four-hour-based staff-scheduling privileges fall below one direct-care staff to every fifteen residents or major fraction thereof, and
- (3) at least two direct-care staff shall be on duty and awake at all times.

(b) ~~Requirements for eligibility.~~ Determination of flexible staff scheduling privileges shall be based on compliance with the requirements at 63:1-1925.2(B)(6) and review of the staffing hours reported to the Oklahoma Health Care Authority. Reports shall be submitted to the Oklahoma Health Care Authority either through electronic mail or three and one quarter inch diskette in an electronic format approved by that agency. The reviewed hours shall be for the previous three (3) calendar months from the date the request for determination is received.

(c) ~~Determination of compliance.~~ A determination of compliance with the requirements at 63:1-1925.2(B)(6)(a)(2) (4) will be based on staffing reports and surveys for the three (3) months preceding the date the request for determination is received by the Department. For intermediate care facilities for the mentally retarded loss of eligibility shall include findings of non-compliance with the Condition of Participation at 42 CFR 483.430, Facility Staffing.

(d) ~~Failure to meet the direct care service rate.~~ Facilities that have been granted flexible staff scheduling privileges and receive a determination they have not met the direct care service rate shall lose their flexible staff scheduling privileges until the facility re-establishes their eligibility under the requirements at 63:1-1925.2(B)(6)(b) and (c). *Facilities shall have the right to appeal and to the informal dispute resolution process with regard to penalties and sanctions imposed due to staffing noncompliance.* [63:1-1925.2(E)].

(e) ~~Loss of eligibility based on surveys or fraud.~~ Facilities seeking to re-establish flexible staff scheduling privileges after a loss of eligibility under 63:1-1925.2(B)(7) shall be subject to the requirements at OAC 310:675-13-14(a), (b) and (c). For intermediate care facilities for the mentally retarded loss of eligibility shall include findings of non-compliance with the Condition of Participation at 42 CFR 483.430, Facility Staffing.

(f) ~~Minimum staff in flexible staffing.~~ A facility failing to meet the flexible staff scheduling requirement at 63:1-1925.2(B)(5)(b) shall be ineligible for flexible staff scheduling privileges until the facility re-establishes their eligibility under the requirements at 63:1-1925.2(B)(6)(b) and (c).

(g) ~~Notification requirements.~~ The Department shall notify the facility and Oklahoma Health Care Authority on all decisions of eligibility.

(h) ~~Re-establishing eligibility.~~ A facility seeking to re-establish eligibility shall submit a written request to the Department. A request to re-establish eligibility is subject to the requirements at OAC 310:675-13-14(b).

(b) Loss of twenty-four-hour-based staffing privileges. On and after January 1, 2004, the State Department of Health shall require a facility to maintain the shift based staff-to-resident ratios provided in 63 O.S. 1-1925.2(B) if the facility has been determined by the Department to be deficient with regard to:

(1) Twenty-four-hour-based schedule in 63 O.S. 1-1925.2(B)(5) (a) – (c).

(A) Shall maintain a direct-care-staff-to-resident ratio based on overall hours of direct-care service per resident per day rate of not less than two and ninety one-hundredths (2.90) hours per day;

(B) at no time shall direct-care staffing ratios fall below one direct-care staff to every fifteen residents or major fraction thereof; and

(C) at least two direct-care staff shall be on duty and awake at all times.

(2) Fraudulent reporting of staffing on the Quality of Care Report, or

(3) A complaint or survey investigation that has determined substandard quality of care as a result of insufficient staffing. For intermediate care facilities for individuals with intellectual disabilities, loss of eligibility shall include findings of non-compliance with the Condition of Participation at 42 CFR 483.430, Facility Staffing.

(c) Eligibility requirements for twenty-four-hour-based staffing following deficient practice.

(1) The Department shall require a facility to achieve and maintain the shift-based, staff-to-resident ratios found at in 63 O.S. 1-1925.2(B)(3), for a minimum of three (3) calendar months before being considered eligible to implement twenty-four-hour-based staff scheduling.

(2) Determination by the Department that the facility has achieved and maintained for at least three (3) months the shift-based, staff-to-resident ratios, and has corrected any deficiency described in OAC 310:675-13-14 (c), the Department shall notify the facility of its eligibility to implement flexible twenty-four-hour-based staff-scheduling privileges.

(d) Right to Appeal. Facilities shall have the right to appeal and to the informal dispute resolution process with regard to penalties and sanctions imposed due to staffing noncompliance. [63:1-1925.2(E)].

(e) Quality of Care Report Requirement. Staffing hours reported to the Oklahoma Health Care Authority shall be submitted electronically through OHCA's Quality of Care (QOC) portal.

(f) Monitoring and evaluating twenty-four-hour-based staffing facilities. The department will monitor staffing reports of twenty-four-hour-based staffing facilities that fail to meet the requirements at 63 O.S. 1-1925.2(B)(5)(a) – (c).

(g) Shift-based ratios for noncompliant facilities. This paragraph implements 63:1-1925.2(F)(4).

(1) When the provisions of 63:1-1925.2(F)(1) are in effect, pursuant to 63:1-1925.2(B)(7), the following minimum direct-care-staff-to-resident ratios for non-compliant facilities shall apply in addition to other state and federal requirements related to the staffing of nursing facilities:

(A) From 7:00 a.m. to 3:00 p.m., one direct-care staff to every five residents,

(B) From 3:00 p.m. to 11:00 p.m., one direct-care staff to every seven residents, and (C) From 11:00 p.m. to 7:00 a.m., one direct-care staff to every thirteen residents.

(2) When the provisions of 63:1-1925.2(F)(2) are in effect, pursuant to 63:1-1925.2(B)(7), the following minimum direct-care-staff-to-resident ratios for non-compliant facilities shall apply in addition to other state and federal requirements related to the staffing of nursing facilities:

(A) From 7:00 a.m. to 3:00 p.m., one direct-care staff to every five residents,

(B) From 3:00 p.m. to 11:00 p.m., one direct-care staff to every six residents, and

(C) From 11:00 p.m. to 7:00 a.m., one direct-care staff to every eleven residents.

(3) When the provisions of 63:1-1925.2(F)(3) are in effect, pursuant to 63:1-1925.2(B)(7), the following minimum direct-care-staff-to-resident ratios for non-compliant facilities shall apply in addition to other state and federal requirements related to the staffing of nursing facilities:

(A) From 7:00 a.m. to 3:00 p.m., one direct-care staff to every four residents,

(B) From 3:00 p.m. to 11:00 p.m., one direct-care staff to every six residents, and

(C) From 11:00 p.m. to 7:00 a.m., one direct-care staff to every eleven residents.

